No. 1094

IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

ELIZABETH ARDEN INC., ELIZABETH ARDEN SALES CORPORATION and FLORENCE N. LEWIS,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

STUART N. UPDIKE,
Attorney for Petitioner.

J. HOWARD CARTER,
JOHN J. MACCHIA,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

Cases Cited.

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

ELIZABETH ARDEN INC., ELIZABETH ARDEN SALES CORPORATION and FLORENCE N. LEWIS,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States and to the Honorable the Chief Justice and Justices Thereof:

The petition of Elizabeth Arden Inc. and Elizabeth Arden Sales Corporation, corporations, and Florence N. Lewis, president of said corporations, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows to this Court:

A

Jurisdiction

This proceeding was instituted by petitioners in the Circuit Court of Appeals for the Second Circuit pursuant to the Act of October 15, 1914, c. 323 as amended [15 U. S. C. A. Sec. 21] wherein petitioners sought to set aside an order of the Federal Trade Commission (hereinafter sometimes called the "Commission") dated October 3, 1944, ordering

petitioners to cease and desist from certain practices allegedly in violation of Section 2(e) of the Clayton Act as amended by the Robinson-Patman Act [15 U. S. C. A. Sec. 13(e)].

The jurisdiction of this Court rests upon Section 45(c) of Title 15 of the United States Code and Section 240 of the Judicial Code as amended [28 U. S. C. A. Sec. 347].

B

Opinion Below

The opinion of the Circuit Court of Appeals for the Second Circuit by Chase, Clark and Frank, Circuit Judges, appears at 156 F. (2d) 132.

C

Summary Statement

The Petitioners

Elizabeth Arden Sales Corporation, a Delaware corporation, is engaged in the sale to retail stores throughout the United States of cosmetics, toilet preparations and related articles [ff. par. One (b)].* All of these products are manufactured by Elizabeth Arden Inc., a New York corporation, and sold by it, exclusively to the Sales Corporation [ff. par. One (a), (d)]. These products are prestige products which "stand at or near the top" of the competitive field in their appeal to those who purchase products having an aura of exclusiveness [ff. par. Three]. Retail stores at which the products are sold are selected by Elizabeth Arden Sales Corporation with a view to enhancing and maintaining that

* The facts set forth in this petition, unless otherwise indicated, are derived from the Commission's findings of fact. Those findings, which appear at pp. 10-23 of the Record, are referred to as "ff. par. .....".

prestige. Elizabeth Arden Sales Corporation has 725 department store accounts, 25 specialty shop accounts and about 2,250 drugstore accounts [ff. par. Three].

The three petitioners for the purposes of this and prior proceedings have been considered one business entity and except as otherwise stated are so treated [ff. par. One (d)].

Complaints of the Commission

The Commission commenced its proceeding against the corporate petitioners by service of its complaint on May 15, 1937, charging violation of subsections (a), (d) and (e) of Section 2 of the Clayton Act as amended. Florence N. Lewis was added as a party by service of an amended complaint on June 25, 1937. In the amended complaint petitioners were charged not only with violation of subsections (a), (d) and (e) of Section 2 of the Clayton Act as amended, but were also charged with violation of Section 5 of the Federal Trade Commission Act.

The Commission, by an amended and supplemental complaint, dropped the charge under Section 2(d). The charge that petitioners had violated Section 5 of the Federal Trade Commission Act was dismissed after the Commission's hearings. Likewise, the Commission, in its final order, dismissed the charge that petitioners had violated Section 2(a). Thus, the only charge remaining and which was reviewed by the court below was the claimed violation of Section 2(e).

The complaint charges that petitioners violated Section 2(e) by failing to accord all of their customers certain services and facilities on proportionally equal terms in that petitioners, in furtherance of the sale of Arden products, furnished to some, but not all, of their customers the services of such personnel known as demonstrators.

Petitioners' Answers

Elizabeth Arden Sales Corporation is the only petitioner which furnishes the services or facilities which the Commission has condemned as unlawful. Therefore, for brevity, we will only discuss here the answer interposed by the Sales Corporation.

That answer, in addition to denials and admissions of facts, affirmatively pleads that the Act is unconstitutional and void in that:

1. It transcends the authority of Congress under Article 1, Section 8 of the Constitution of the United States;

2. It deprives petitioners of due process of law and the rights guaranteed them by the Fifth Amendment to the Constitution of the United States; and that

3. It constitutes an unlawful delegation by Congress to the Federal Trade Commission of legislative authority contrary to Article 1, Section 1 of the Constitution of the United States.

D

The Facts and Decisions Below

Statute Involved

The only charge under review is the claimed violation of Section 2(e) of the Clayton Act as amended which reads:

"It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale

of such commodities so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Facts—The Demonstrator Service

The review sought herein concerns itself only with questions of law. The facts which follow are taken from the findings of fact made by the Commission. These findings of fact, while not admitted, were not disputed by petitioners in the court below and will not be disputed here.

The only business practice which the Commission has condemned is the so-called "demonstrator" service. A demonstrator is a salesgirl, who may be selected by petitioners or may be a sales employee of the customers in question, but in either event is trained by the Sales Corporation in the use and sale of its products [ff. par. Four (b)]. These demonstrators are actually under the immediate direction of the store where they work, but their duties are primarily, though not exclusively, the sale of Arden products. The demonstrator also sells products of other manufacturers if the customer asks for them specifically and she also makes herself generally useful in the store [ff. par. Four(b)].

One or more demonstrators are placed in retail stores purchasing Arden products, selected with a view to the advantages to be gained by the Sales Corporation in so doing [ff. par. Five (a)]. Petitioners are willing to furnish the demonstrator service to any customer who requests it provided that customer can comply with certain requirements [ff. par. Eight (a)] as follows:

1. Petitioners require the store in which a demonstrator is furnished to maintain a representative line of Arden products [ff. par. Five (b)];

2. In addition, the customer must make available adequate display counters in a prominent location devoted exclusively to Arden products. The location and size of the space devoted to this purpose are flexible factors, depending on the appeal and elaborateness of the display most beneficial to the sale of Arden products [ff. par. Five (c)];

3. In addition, the customer must advertise Arden products, secure show window displays and "tie in" Arden products with any fashion shows which may be conducted [ff. par. Five (d), (e), (f)];

4. Likewise, where there is demonstrator service petitioners seek to limit the cost to ten per cent of the net wholesale purchases [ff. par. Five (g)].

The foregoing requirements depend on negotiations upon an individual basis whereby petitioners will furnish demonstrator service in concert with the cooperation which they can secure from said customer [ff. par. Five (h)].

Petitioners' products are sold to some 725 department stores, some 25 specialty shops and 2,250 drugstores. All these customers are selected with the view of maintaining "prestige" of the Arden line [ff. par. Three]. Petitioners furnish demonstrators to only a small number of the foregoing accounts (265 accounts or less than 10%), almost all of which were chosen from among the department store and specialty shop accounts [ff. par. Six (a), (c); R. 94]. While these demonstrator accounts represent less than 10% of the total accounts, they represent almost 40% of petitioners' total sales [R. 94].

The demonstrator service is furnished to so small a percentage of accounts because petitioners' requirements for furnishing this service are such that only certain customers could comply, *i.e.*, department stores and specialty shops

[ff. par. Eight (a)]. As a consequence, the majority of accounts are rarely accorded demonstrator service.

The demonstrator service is not a peculiar practice of petitioners, it is followed by practically all cosmetics manufacturers and distributors. Petitioners did not originate the practice; it has been prevalent in the industry for over fifty years and was an effective method of competition long before petitioners entered the industry [ff. par. Four (a)].

Decisions Below

Based on the foregoing facts, the Commission on October 3, 1944 issued its order which provides in part that petitioners cease and desist from discriminating among purchasers:

> "1. By furnishing or contributing to the furnishing of demonstrator services to any retailer purchasing their products when such services are not accorded on proportionally equal terms to other retailer purchasers located in the same city, or other retailer purchasers who in fact resell such products in competition with retailers who receive such services.
>
> "2. By furnishing or contributing to the furnishing of any services or facilities connected with the handling, sale, or offering for sale of products purchased from respondents to any retailer upon terms not accorded to competing retailers on proportionally equal terms."

Petitioners sought to set the order aside by petitioning the Circuit Court of Appeals for the Second Circuit. That Court, however, upheld the Commission's order by its decision on June 5, 1946 whereby it dismissed the petition for review. A decree was entered on December 5, 1946.

The Circuit Court, in granting the Commission's order, rejected the following contentions advanced by petitioners [156 F. (2d) 132; R. 92]:

1. That Section 2(e) is unconstitutional because of the omission of the words "engaged in commerce".

2. That the standard in Section 2(e) is so indefinite that men of common intelligence cannot adequately grasp its meaning and it is therefore invalid as an improper delegation of legislative power and violative of due process.

3. That Section 2(e) must be construed to mean that the furnishing of services and facilities is unlawful only when—as expressly provided in Section 2(a)—the Commission finds that the practice has had an adverse effect upon competition.

E

The Questions Presented to This Court

The several questions presented to this Court are as follows:

1. Is Section 2(e), which by its terms applies to "any person" whether engaged in intrastate or interstate commerce, constitutional?

2. Can the failure of Congress to limit Section 2(e) to interstate commerce be validated by the lower court's insertion therein of words of limitation?

The answer depends on a number of subsidiary questions:

(a) Can the lower court validate Section 2(e) by judicially writing in the words "engaged in com-

merce" and base its action on the finding that there is a "clear interrelation of (d) and (e)"?

(b) Can the lower court so validate Section 2(e) by the doctrine of interrelation and deny in the same decision that Section 2(a) with its limitations should not likewise be read into Section 2(e)?

4. Do the provisions of Section 2(e) apply to a case where the facility furnished (i.e., demonstrators) cannot be subjected to a mathematical ratio or proportion?

5. If the provisions do apply even in cases where services cannot be proportionalized, does the use of demonstrators in the cosmetics industry—a long and generally accepted practice in the industry and in other industries—constitute a violation *per se* of Section 2(e)?

6. Does Section 2(e), which permits furnishing facilities on "proportionally equal terms", provide a standard so indefinite that men of common intelligence cannot grasp its meaning and that therefore it is invalid as an improper delegation of legislative power and violative of due process.

The answer depends on the followng subsidiary points:

(a) A judicial interpretation of the term "proportionally equal terms".

(b) The factors which may be considered in establishing a standard for furnishing demonstrator services or facilities on proportionally equal terms, in the cosmetics industry.

(c) If volume of business is only one of the factors and—as the Commission concedes—other factors may be considered, what are these other factors and what yardstick is to be used under the law so that the mandate "proportionally equal terms" may be complied with as regards furnishing of demonstrators in the cosmetics industry.

F

Grounds for Granting the Writ of Certiorari

1. The decision below involves a serious question of the constitutionality of Section 2(e) of the Clayton Act as amended (the Robinson-Patman Act). It is our contention that the court erred in finding the statute constitutional for the following reasons:

(a) The words "engaged in commerce" are omitted from this section so that the statute literally applies to all persons whether or not engaged in commerce.

(b) The standard set forth in Section 2(e) is so indefinite that it defies interpretation and, therefore, constitutes (1) improper delegation of legislative power, and (2) violation of due process.

2. Even if the decision below is correct, the case involves an unsettled question as to the validity of important legislation which should be settled by this Court for the following reasons:

(a) Demonstrators have been used in the cosmetics industry by the leading manufacturers and distributors for many years prior to the passage of the Robinson-Patman Act. These demonstrators are employees who work under the direction of purchasers or retail stores and whose salaries are paid in whole or in part by the cosmetics manufacturers. The case at issue therefore reaches all the members of the cosmetics industry—one of the leading industries in the nation—and is not limited to the petitioners or any small portion of the industry.

(b) The sales aid furnished by the use of demontractors is not incidental but represents, in the case of petitioners, about 40% of total sales and in the

case of the average competitor the percentage is equally imposing. The importance of this aid is amply shown by figures furnished by the Toilet Goods Association which show that annual sales of toilet goods (excluding soaps and things of that nature) increased from

$350,000,000 in 1939 to
$659,900,000 in 1945.

(c) The very issue of the use of demonstrators has been attacked by the Commission in similar proceedings against several other members of the industry and indeed will require further prosecution reaching the balance of the leading cosmetics manufacturers. The question of the legality of the use of these demonstrators under Section 2(e) has never been finally settled by this Court.

3. Assuming the statute is constitutional the review here sought is vital to the maintenance of a service or facility which is the backbone of the cosmetics industry. The furnishing of that service or facility is specifically permitted by statute if accorded on "proportionally equal terms". The adjudication of the meaning of this term by this Court is of manifest vital importance to the industry for the following reasons:

(a) There is no statutory definition of the term or of the factors to be used in determining how facilities may be furnished on "proportionately equal terms".

(b) The term "proportionately equal terms" has not received any legal construction by any court. It is especially significant that terms in a statute are normally construed only through a proceeding to enforce that statute. That was not done by the lower court in this case.

(c) The wording of the section, the background of this legislation, and the Congressional debates thereon clearly demonstrate that the use of volume of business alone is not the sole basis for determining "proportionately equal terms" upon which services are accorded. Therefore, the use of demonstrators under present standards based on intangible and flexible factors is not illegal *per se*.

(d) The Commission and court below, instead of defining the standard allegedly established by the words "proportionately equal terms", advanced the specious theory that any business practice, regardless of its inception or importance, which could not be accorded to all purchasers under a fixed mathematical proportion was intended to be outlawed. Such a specious finding flies in the face of the will of the Congress which never intended to outlaw the use of services based on intangible and flexible factors. If Congress intended to outlaw all services unless one could apply a fixed formula based on volume of sales alone why should it use such words, strange to the industry and strange to the law, as "proportionally equal terms"?

(e) According to the decision of the lower court, the use of demonstrators as prevails in the industry today is illegal *per se*. We submit that the grievous error of such a ruling is clear because it results not only in a radical change of the fundamental sales practice in the entire cosmetics industry but total abolition of that practice.

4. The court below not only erred in holding the statute in question constitutional but also erred by its failure to define the applicability of the statute and to interpret the very terms which constitute the difference between illegality and the furtherance of a long-established business practice in the cosmetics industry.

5. The decisions in other cases dealing with Section 2(e) have not finally decided the constitutionality of this statute. The case of *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726 (1945) which dealt with the base point system of pricing under Section 2(a) also discussed Section 2(e) as regards advertising facilities accorded by dextrose manufacturers. But no question of constitutionality was raised or decided in that case. The 8th Circuit Court of Appeals in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. (2d) 988 (8th Cir. 1945) declared the statute constitutional but that decision was not reviewed by this Court and did not pass on petitioners' contention that the indefinite standard set forth in the statute violates due process and constitutes a delegation of legislative authority. On the other hand, the constitutional point decided by that court was based on the erroneous supposition that Section 2(e) was open to two constructions and the court was therefore permitted to write in the limitative words. Moreover, certiorari was denied by this Court [326 U. S. 773 (1945)]. Indeed, one of the very arguments advanced by respondents in that case for the denial of certiorari dealt with the contention that the *Blass* case was based on the Commission's denunciation of the practice and any question of certiorari should therefore await a petition to review the Commission's case (the instant application).

6. The question of Federal law involved is an important one at this time. There are presently pending six other cases brought by the Commission against large cosmetics firms all directed to the same use of demonstrator services under Section 2(e). These and other leading competitors in the cosmetics industry who use the same service will be directly affected by a final ruling on this very important instrument of competition in the industry. There is no question that

the issues involved here are equally important as the issues involved in the basing point system of freight charges under the same statute, reviewed by this Court in:

Corn Products Refining Co. v. *F. T. C.*, 324 U. S. 726 (1945);

F. T. C. v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this honorable Court to the Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and that the decision of said Circuit Court of Appeals be reversed in so far as it upheld the order of respondent and that petitioners have such other and further relief as may be just.

Dated: New York, N. Y., March 3rd, 1947.

ELIZABETH ARDEN INC.
ELIZABETH ARDEN SALES CORPORATION
FLORENCE N. LEWIS

By STUART N. UPDIKE,
Attorney for Petitioners.

J. HOWARD CARTER,
JOHN J. MACCHIA,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT I.

The court below erred in holding that the manner in which petitioners furnished demonstrator service to customers is illegal. The question is of sufficient importance not only to petitioners but to the entire cosmetics industry so as to merit review by this Court.

A. Importance of Demonstrator Service.

This case for the first time brings to this Court the question of the use of the demonstrator service in the cosmetics industry which, though in use for the past half century, was never the subject of anti-trust prosecution prior to the passage of the Robinson-Patman Act. The practice is used not only by petitioners but by all the leading cosmetics manufacturers in the country. The importance of this service to the industry is clearly manifested by the fact that sales resulting from this service are not incidental or casual but represent, in the case of petitioners, forty per cent of total sales and in the case of average competitors the percentage is equally imposing. Figures furnished by the Toilet Goods Association show that the annual sales of toilet goods (excluding soaps and things of that nature) increased from

$350,000,000 in 1939 to
$659,900,000 in 1945.

The volume of business involved and the percentage of that business affected by the decision of the lower court is cogent proof of the importance of the review sought here.

The importance of that review is magnified by the fact that at or about the time the case at issue was started against petitioners in May, 1937, the Commission started similar proceedings, directed at the identical practice (demonstrator service), against six other large cosmetics concerns, all in competition with petitioners. There are some fifty to eighty other leading cosmetics firms which though not prosecuted by the Commission have and do use the system in question. If the decision of the lower court stands, it will affect the very backbone of the industry since petitioners and their leading competitors find the use of demonstrators a vital, important practice without which their very business is threatened. Therefore, the question is not one of local or limited application; it strikes at the very existence of the cosmetics industry. We submit that the decision of the lower court, which would in effect prohibit such a basic and long-standing business practice, should not be permitted to stand without review by this Court.

B. The Court Below Erred in Holding the Statute Constitutional. Assuming There Was no Error in That Holding, the Case Involves Unsettled Questions of Interpretation Which Have Not been, but Should be, Settled by This Court.

The court below erred in finding that the statute is constitutional and that it sets forth a definite standard which petitioners should follow in complying with the terms thereof. Even if the court below did not err in holding the statute constitutional, the case involves unsettled questions of validity, interpretation and applicability of important legislation which have not been, but should be, settled by this Court.

In fact, the arbitrary and narrow interpretation placed on the phrase "proportionally equal terms" by both the

Commission and the court below is clearly inapplicable to the demonstrator service. Congress by the use of this descriptive phrase must have intended a standard other than a simple, fixed, mathematical ratio based on volume of sales. Neither the Commission nor the court below ever took serious issue with the foregoing contention. Contrary to this manifest Congressional intent, we find the argument advanced by the Commission, and approved by the lower court, that "proportionally equal terms" establishes a standard which must be applied to all purchasers and if either the facility furnished or the requirements on which the service is based are such that petitioners cannot avail themselves of a fixed, long established business facility, then that facility must be abolished. In effect, this makes the use of demonstrators in the cosmetics industry illegal *per se*—a conclusion which was neither intended by the Congress nor which can be read into the statute.

It is indeed a fallacious proposition of law to state on the one hand that a definite standard appears in a statute and on the other hand that if the standard does not contain factors applicable to existing business practices then the latter must be abolished. Petitioners, instead of obtaining a judicial construction of the phrase "proportionately equal terms", were met by the lower court's decision that if a facility is dependent on intangible, indeterminate requirements, other than volume of trade, it is incapable of being furnished on proportionally equal terms and should, therefore, be abolished. Such a decision begs the question of whether a determinate standard appears in the statute. Because of this decision the future of the industry is seriously threatened and such far-reaching effects warrant review by this Court of the decision below.

POINT II.

The court below erred in holding Section 2(e) of the Robinson-Patman Act constitutional.

A. Section 2(e) Literally Applies to Intrastate and Interstate Commerce.

Section 2(e) of the Robinson-Patman Act [15 U. S. C. A., Sec. 13(e)] reads:

> "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

All the other sections of the Robinson-Patman Act contain the limitative words "engaged in commerce".

That any Federal statute which attempts to regulate commerce other than interstate is void is beyond question. [*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1936)]. Any statute which by its terms overreaches Federal powers is void and words confining section 2(e) within constitutional limits cannot be supplied by the Court.

Hill v. *Wallace*, 259 U. S. 44 (1921);
James v. *Bowman*, 190 U. S. 127 (1902);
Trademark Cases, 100 U. S. 82 (1879);
United States v. *Reese*, 92 U. S. 214 (1876).

In the *Trademark Cases*, *supra*, this precise problem was decided. There, too, Congress failed to limit the appli-

cation of the Act of July 8, 1870 (16 Stat. 198) to interstate commerce. There, too, Congress enacted a statute applying by its terms to "any person" without words of limitation. There, too, it was urged that the Act should be construed to confine its application within the regulatory power of Congress. The Court refused and held (pp. 96, 98):

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian Tribes. If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."
>
> • • • • • •
>
> "It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. • • • While it may be true that when one part of a statute is valid and constitutional and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. • • •"

The fatal omission of limitative words in a statute and the serious results of such omission were acknowledged by the lower court in its decision [156 F. (2d) 132] when it stated at page 134:

> "* * * a statute should be read in such a way as to carry out the Congressional intention, *despite a contrary literal meaning*, especially in order to avoid unconstitutionality". (Italics supplied.)

According to this observation by the lower court, the statute in its "literal meaning" might be unconstitutional. Moreover, the lower court to uphold the constitutionality of the section wrote in the omitted limitative words. In view of these steps taken by the lower court to uphold a patently void statute, review by this Court is necessary for a final determination of its validity.

B. The Standard Set Forth in Section 2(e) Constitutes an Unconstitutional Delegation of Authority.

The phrase of the statute which is of special significance at this point permits the furnishing of services or facilities "on proportionally equal terms". Clearly, it was intended to cover factors other than volume of business and was never intended to deprive manufacturers of standards and factors long in use in their respective industries. Senator Logan in his discussion of the meaning of this phrase stated (80 Cong. Rec. 3231):

> "* * * if the seller grants an advertising allowance to one customer there is no reason why he should not grant, under *identical circumstances*, the same allowance to another customer based upon the quantity."

Likewise, Congressman Utterback, in considering the phrase, "proportionally equal terms", stated (80 Cong. Rec. 9561):

> "The bill also prohibits the seller from furnishing services or facilities to the purchaser in connection with the processing, handling or sale of the commodities concerned unless they are accorded to all purchasers on proportionally equal terms. *Again, the last phrase has reference to the several purchasers' equipment and ability to satisfy the terms upon which the offer is made, or the services, or facilities furnished to any other purchaser.*" (Italics supplied.)

Likewise, the House Report on the bill states (House Report No. 2287, March 31, 1936):

> "To illustrate: Where, as was revealed in the hearings earlier referred to in this report, a manufacturer grants to a particular chain distributor an advertising, allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, *but equally able to furnish the same service per store, and under conditions of the same value to the seller, would be entitled to a similar allowance on that basis.*" (Italics supplied.)

It is submitted that volume of business cannot be the sole guide. The Commission has not disputed this contention. Since, clearly, there are other factors permitted in defining the standard to be applied, we must go beyond the terms of the statute to determine the type of factors permitted and the relative weights of each.

The Commission's argument, upheld by the court below, amounts to the conclusion that petitioners must accord ser-

vices to all purchasers in amounts equal to a given ratio. But the Act fails to define or outline the factors to be considered in that ratio. Therefore, we find the Commission avoiding the problem by contending that the standard is clearly expressed by the mathematical equation which follows:

$$\frac{\left.\begin{array}{c}\text{Quantity of services or}\\ \text{facilities furnished to}\\ \text{Purchaser A}\end{array}\right\}}{\left.\begin{array}{c}\text{Quantity of conditions}\\ \text{exacted from Pur-}\\ \text{chaser A}\end{array}\right\}} = \frac{\left\{\begin{array}{c}\text{Quantity of services}\\ \text{or facilities furnished}\\ \text{to Purchaser B}\end{array}\right.}{\left\{\begin{array}{c}\text{Quantity of conditions}\\ \text{exacted from Pur-}\\ \text{chaser B}\end{array}\right.}$$

Obviously this neat, compact formula does not present a definite standard or prescribe the conduct to be followed in any particular state of facts. It cannot supplant the fixed principle that the standard must be contained in the statute. Under this formula wherein lies the definite standard which establishes what services may be accorded and what conditions must be exacted from a customer like Saks Fifth Avenue as contrasted to the local or country drugstore. Wherein does this mathematical word puzzle answer the questions:

> What is meant by "proportionally equal terms"?
> Proportional to what?
> Equal to what?

The failure to answer these questions shows that the statute prescribes no conduct which can be followed. It is no answer to say that "facilities furnished" represent the "numerator" and "conditions exacted" the "denominator". These "fractions" which make up the formula merely re-state the vague, indefinite and indeterminate phraseology of the statute.

Legislation in this field should set forth a standard which is intelligible and reasonably capable of uniform application by the administrative body. It is clear that Section 2(e) does not have such a standard which would enable the Commission to uniformly apply the requirement that services or facilities may be furnished on "proportionally equal terms". Nor does it contain a standard which manufacturers may use as a guide in the furnishing of these services or facilities. In view of the absence of a definite and intelligible standard the Commission must necessarily establish its own legal standards in every proceeding brought before it. It thereby exercises a legislative function in that it adds to, takes from or modifies the statute by every attempted enforcement. This results in an unconstitutional delegation of legislative power to the Commission.

Schechter v. *U. S.*, 295 U. S. 495 (1935);
Panama Refining Co. v. *Ryan*, 293 U. S. 388 (1935);
Mutual Film Corp. v. *Industrial Commission*, 236 U. S. 230 (1915).

It is submitted that such an exercise of a legislative function by the Commission applying to the entire cosmetics industry should be reviewed by this Court.

C. The Phrase "Proportionally Equal Terms" is so Vague and Indefinite that Men of Common Intelligence Must Guess at the Meaning; it Denies Due Process.

It is submitted that, for the reasons set forth above, the vacuous phraseology of Section 2(e) fixes no ascertainable standard of guilt. The phrase "proportionally equal terms" has no statutory definition, has never been judicially construed and has no common law meaning. The phrase is so indefinite, inexplicit and ambiguous that it

deprives all persons subject to its terms due process of law. The phrase does not sufficiently establish the conduct which is needed to avoid its penalties and therefore the section is void.

Champlin Refining Co. v. *Corporation Commission*, 286 U. S. 210 (1932);
Connally v. *General Construction Co.*, 269 U. S. 385 (1925);
Yu Cong Eng. v. *Trinidad*, 271 U. S. 500 (1925);
International Harvester Co. v. *Kentucky*, 234 U. S. 216 (1914);
Collins v *Kentucky*, 234 U. S. 634 (1914).

The decision below and the findings of the Commission show that the absence of any standards of legal obligation under the Act subjects the rights of petitioners and others to the caprice of the triers of fact. The failure of the lower court and the Commission to show that the statute supplies a definite standard, to be followed by persons who furnish facilities or services to their customers, violates due process.

Petitioners, as well as all leading cosmetics manufacturers and distributors are especially concerned that these questions be reviewed by this Court so that, even if the statute is constitutional, some judicial interpretation be placed on the phrase "proportionally equal terms" in an industry which has used this service and facility as a major competitive practice for the past fifty years.

POINT III.

The court below erred in holding that a violation of Section 2(e) exists without proof that the practice involved has an adverse effect on competition. The matter is one of general concern meriting review.

The court below was not averse to using the doctrine of interrelation between the various subdivisions of Section 2 of the Clayton Act as amended. In contending the statute was constitutional the court below insisted on writing into Section 2(e) the terms of Section 2(d) and posited this action on its desire to uphold the constitutionality of the Act. This was done despite the fact that no ambiguity existed in Section 2(e) since it completely omitted the limitative words "engaged in commerce". On the other hand, the court below refused to read into Section 2(e) the provision in Section 2(a) that the Commission must find a substantial lessening of competition before finding a violation of that Section. The Court so held despite the fact that Section 2(e) is the only subdivision which requires that a violation exists if a person should "discriminate in favor of one purchaser against another". At least, this phrase creates an ambiguity regarding the necessity of finding an adverse effect on competition. The lower court erred when it applied the doctrine of interrelation for the benefit of the Commission, where omitted words were concerned and at the same time denied the doctrine to petitioners where ambiguous language was concerned.

It is submitted that such fallacious reasoning, concerning such a poorly, ambiguously worded statute should be reviewed by this Court.

POINT IV.

Assuming that Section 2(e) is constitutional, the decisions below with respect to the use of demonstrators do violence to the language of the Section. Questions of statutory interpretation are involved which are of general interest to manufacturers and should be passed upon by the Court.

A. This Court Should Consider Whether Section 2(e) Applies to the Use of Demonstrators in the Cosmetic Industry.

Assuming the statute is constitutional, the Commission and the court below, by deciding that all facilities like demonstrator services are illegal since they cannot be accorded on proportionally equal terms, have given the statute an interpretation which was never intended. Instead of defining or evaluating the factors to be used in considering proportionally equal terms the Commission and the court below decided that any service which cannot be accorded to all purchasers—regardless of reason—is illegal and void under the statute. Such a decision is plainly erroneous and for that reason we submit that the statute was not intended to cover a facility like demonstrators in the cosmetics industry.

B. It is an Issue of General Concern to all in the Cosmetics Industry that Judicial Interpretation Set Forth What Factors May be Used as a Yardstick in According Demonstrator Services on Proportionally Equal Terms.

If the statute is constitutional and was intended to cover such a facility as cosmetics demonstrators, the phrase "proportionally equal terms" should receive judicial interpretation so that petitioners and the balance of the industry may abide by the mandate of the statute. The court below and

the Commission have not resolved any definition of the term capable of application or fulfillment. On the contrary, the decision below results in applying this section as an inexorable abolition of demonstrator services, clearly contrary to Congressional intent.

We are not unmindful that the purpose of antitrust regulation is to adopt reasonable means to protect interstate commerce from injurious practices and prevent unfair discriminations [*Sugar Institute case*, 297 U. S. 553 (1935)]. We are equally concerned with the maintenance of these rules and practices. It is with these principles in mind that the review herein is sought. The interpretation of a phrase which we have found ambiguous, vague and indefinable is especially significant when the lack of interpretation by the lower court could result in an abolition of one of the most important practices in the industry.

Conclusion.

We submit, therefore, that the considerations discussed herein afford substantial justification for the petition and warrant the review prayed for therein.

Respectfully submitted,

STUART N. UPDIKE,
Attorney for Petitioners.

J. HOWARD CARTER,
JOHN J. MACCHIA,
Of Counsel.